United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 30, 2007

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Tuality Community Hospital
36-CA-10091

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This Section 8(a)(5) case was submitted for advice as to whether the Employer's decision to implement changes to unit employee contractual health care benefits without giving the Union notice and opportunity to bargain should be analyzed as a Section 8(d) contract modification violation or a unilateral change violation. We conclude that this case should be analyzed as a unilateral change violation because the charge alleges that the Employer made significant changes to medical insurance premiums and co-pays without bargaining with the Union, and not that the Employer failed to honor a provision in the contract.

We further conclude that the Employer in fact did not unilaterally implement any changes but rather acted in accord with both its established past practice and the parties' contract. The Employer's initial announcement of changes in medical insurance premiums and co-pays followed established past practice; the Employer thereafter changed premiums and co-pays for all hospital employees including unit employees who exercised their contractual right to receive them in accord with past practice and the contract; and the Employer otherwise bargained with the Union in good faith as required by the parties' contract.

FACTS

Since approximately 1977, the Oregon Nurses Association (ONA) has represented all registered nurses employed by Tuality Community Hospital (Employer). The parties' current collective-bargaining agreement is effective from April 4, 2006 to December 31, 2007. Article 8 of that Agreement states in relevant parts:

> C. Nurses may participate in the "Goodfit" plan offered by the Hospital.
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> 1. Medical Insurance. Hospital will offer nurses a medical insurance plan as part of Goodfit with substantially equivalent benefits to those provided in the base plan designated by the Hospital as part of Goodfit as of January, 2006 . . . Hospital will notify Association annually of changes to any component of the Goodfit program.
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> D. If Hospital finds it necessary to offer a base plan that is not substantially equivalent to the base plans existing as of January 1, 2006, or the Hospital is no longer legally permitted to offer a flexible benefits program, the parties shall negotiate an appropriate successor plan. Hospital shall provide Association with notification on any intended change in order to permit timely negotiations. . .

The Employer makes available to all hospital employees a Goodfit plan containing medical, dental, disability, life and vision care insurance. Annually in October, the Employer announces the following year's Goodfit plan. In accord with this practice, on October 10, 2006,[1] the Employer notified ONA that there were a number of changes the Employer would be making to the medical plan for 2007. The Employer outlined the changes and invited discussion.

Later in October, the Employer notified all hospital employees that open enrollment for insurance would start November 6 and end November 17. The Employer gave hospital employees a handout explaining that medical services would essentially remain the same, but that premiums would increase by 5.3% with the Employer continuing to contribute the same percentage it had contributed in 2006. The Employer's handout included a table that showed various increases in employee co-pays. Thereafter during the open enrollment period, unit employee nurses exercised their

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[1] All dates 2006 unless otherwise noted.

contractual right to enroll in the 2007 Goodfit medical plan.[2]

On October 31, ONA informed the Employer that ONA was available to bargain over the impending changes to the nurses' health insurance according to Article 8 section D of the bargaining agreement, providing for bargaining if a plan is not "substantially equivalent" to the 2006 plan. On November 14, the parties met to discuss the changes to the 2007 Goodfit plan, and the Employer explained the reasons for the changes. ONA representatives stated that they could not engage in further discussion without getting input from the nurses.

Around mid-November, ONA sent out informational flyers and ballots to all of its members. The ballots asked employees whether they wanted ONA to accept the Employer's Goodfit medical plan proposal, or alternatively wanted to pay premium increases of 11% or more in exchange for no other plan changes. On December 5, unit employees voted 93 to 4 to keep the current health plan and pay premium increases of 11% or more. On December 18, ONA notified the Employer of the election results and requested bargaining.

On January 1, 2007, the Employer implemented the 2007 Goodfit medical plan changes that it had previously announced on October 10. The Employer accordingly changed the medical insurance premiums and co-pays for all hospital employees, including unit employees, who had enrolled in the 2007 plan.

On January 12, 2007, the Employer and ONA met to bargain about a successor to the 2006 health plan for unit employees. ONA subsequently sent the Employer a health insurance proposal. On February 19, ONA the parties met to discuss ONA's proposal; the parties did not reach an agreement.

ACTION

We conclude that this case should be analyzed as a unilateral change violation because the charge alleges that the Employer made a significant change to medical insurance premiums and co-pays without first bargaining with the Union, and not that the Employer failed to honor a provision in the contract. We further conclude that the

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[2] ONA has not alleged nor adduced evidence showing that the Employer unilaterally enrolled unit employees in the 2007 Goodfit plan.

Employer in fact did not implement any changes but rather acted in accord with established past practice and the parties' contract.

The Board recently summarized the difference between a Section 8(a)(5) unilateral change violation and a Section 8(a)(5)-8(d)contract modification violation.[3] In a unilateral change case, the General Counsel is not relying upon the existence of a contract provision, and instead is alleging that an employer made a significant change in an employment practice and did not bargain about it. The employer may raise a defense that the union waived its right to bargain; the remedy for the violation, if found, is an order to bargain.[4] In a contract modification case, the General Counsel is alleging that a contract provision has been modified. The defense is consent and the remedy for a violation, if found, is to honor the contract.[5]

Here, the Union alleges that the Employer changed medical insurance premiums and co-pays for bargaining unit members without bargaining, and not that the Employer failed to adhere to a contract provision. Thus, this allegation should be analyzed as a unilateral change violation. Under that analysis, we find that the Employer in fact implemented no unilateral changes. The Employer announced and implemented changes on January 1 affecting medical premiums and co-pays for all hospital employees, including unit employees, who enrolled in the 2007 plan, in accord with established past practice and the parties' contract.

The Employer announced the hospital-wide changes to the Goodfit plan in October 10 the same way it had the previous three years. The Employer then implemented those changes beginning on January 1 for all hospital employees who had enrolled in the 2007 plan, including unit employees. In that regard, the contract clearly provides that unit employee nurses are free to participate in the Goodfit plan if they so choose. The January 1, 2007 changes applied only to nurses who exercised their contractual right to sign up for the plan.[6] Based on the

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[3] Bath Iron Works Corp., 345 NLRB No. 33, slip op. at 4 (2005).

[4] Id.

[5] Id.

contract, unit employee nurses were free to not accept the changes in the 2007 Goodfit plan and wait for the parties to reach an agreement for an alternative successor plan.

The Employer's conduct also was consistent with it obligations under the parties' agreement. Article 8 of the contract provides that the Hospital must notify ONA annually of changes to any component of the Goodfit program. Fulfilling its contractual obligation, the Employer on October 10 provided ONA with written notice of the proposed changes for 2007. At this point, the Employer had no other contractual obligations to fulfill unless ONA requested bargaining for a successor plan under Article 8, Section D.

Article 8 Section D provides that if the Hospital finds it necessary to offer a plan "not substantially equivalent" to the 2006 plan, the parties shall negotiate an appropriate successor plan.[7] The Employer has fully complied with that obligation under the contract. The Employer met with ONA on November 14 to discuss the changes, and bargained with ONA on January 12, 2007 and again on February 19. To date, there is no contention or evidence that the Employer has been unwilling to meet and bargain, or that the Employer was meeting without the intent of reaching an agreement.

In sum, the Employer in fact made no unilateral changes to its employment practices and instead continued to implement changes in its insurance plan as it always did in accord with both past practice and its contractual obligations. Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K

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[6] See note 2, supra.

[7] We assume that the changes implemented on January 1 made the 2007 plan "not substantially equivalent" to the 2006 Plan and thus ONA had a contractual right to request bargaining.